

possession of the property is given over to a stranger in perpetuity subject to the payment of a merely nominal rent. For these reasons we are of opinion that the court of first instance was right in the conclusion at which it arrived. We therefore set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs of this appeal and also the costs of the lower appellate court. We extend the time for payment of the price for three months from this date.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
CHINTAMAN AND ANOTHER (DEPONDANTS) v. DULARI
(PLAINTIFF).*

1910
LALJI MISHR
v.
JAGGU
TIWARI.

1910
July 28.

Mortgage—construction of document—Liability for deficiency in interest whether personal merely or a charge on the mortgaged property.

A mortgage deed provided that the mortgagees should take possession of the mortgaged property and out of the rents and profits pay the Government revenue and appropriate Rs. 132 per annum on account of interest at the rate of 11 annas per cent. per mensem. It further provided that should the amount of profits, calculated on the basis of the patwari's accounts, be found insufficient to cover the whole amount payable for interest, the deficiency would be made good by the mortgagor together with interest at the rate of Rs. 2 per cent. per mensem. Held that deficiency in the stipulated interest was realizable as well from the mortgaged property as from the mortgagor personally. *Muhammad Husain v. Sheedarshan Das* (1) referred to.

THE facts of this case are fully stated in the judgement of the court.

Dr. Satish Chandra Banerji, for the appellants.

The Hon'ble Pandit Sundar Lal, for the respondent.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for the redemption of two mortgages dated respectively the 18th of December, 1870, and the 24th of June, 1871, made by one Ganjan Ram. The first mortgage secured a sum of Rs. 1,600 and in it a four biswa share was mortgaged. Under the second mortgage Rs. 400 was borrowed and an additional one biswa share was mortgaged. The plaintiff has acquired the mortgagor's

* Second Appeal No. 1294 of 1909 from a decree of Muhammad Ishag Khan, District Judge of Farrukhabad, dated the 30th of September, 1909, modifying a decree of Daya Nath, Subordinate Judge of Farrukhabad, dated the 31st of March, 1909.

1910

CHINTAMAN
v.
DULARI.

rights in a portion of the mortgaged property and he brought the suit which has given rise to this appeal to redeem the two mortgages offering to pay the principal amounts secured thereby. The mortgagees claimed a further sum of Rs. 14,867-10-9 on account of deficiency of interest.

The first mortgage deed provides that the mortgagees should take possession of the mortgaged property and out of the rents and profits pay the Government revenue and appropriate Rs. 132 per annum on account of interest at the rate of 11 annas per cent. per mensem. It further provides that should the amount of profits, calculated on the basis of the patwari's accounts, be found to be insufficient to cover the whole amount payable for interest, the deficiency would be made good by the mortgagor together with interest at the rate of Rs. 2 per cent. per mensem. There is a similar clause in the second mortgage deed also. The defendants alleged that the rents and profits of the mortgaged property were insufficient for the realization of the full amount of interest at the stipulated rate of 11 annas per cent. per mensem and that under the terms of the mortgage deeds, a large amount was due to them on account of deficiency of interest. The court of first instance found in their favour and made a decree for redemption upon payment of Rs. 14,634-2-3. The plaintiff appealed against this decree to the lower appellate court. The learned Judge of that court was of opinion that for the amount of deficiency in interest there was no charge on the mortgaged property; that the mortgagors undertook only a personal liability for the payment thereof and that the defendants were only entitled to get the amount of deficiency due for the six years preceding the date of the suit. The learned Judge accordingly made a decree for redemption upon payment of the principal amounts of the mortgages and of the amount which he found to be due on account of deficiency in interest for six years preceding the date of the suit. If the view taken by the learned Judge, namely, that there was no charge on the mortgaged property for deficiency of interest, is correct, the decree made by him for payment of the deficiency which arose during the six years preceding the date of the suit is clearly erroneous. It was the mortgagor who according to the learned Judge incurred a personal liability

for the payment of the amount of deficiency. If it was not a charge on the property, the plaintiff, who is the purchaser of the property, could not be saddled with the payment of that amount and such payment could not be declared to be a condition precedent to the redemption of the property. We are of opinion that the learned Judge is in error in holding that the mortgaged property was not security for deficiency of interest. The mortgage deeds provide for payment of interest at the rate of 11 annas per cent. per mensem. The mortgaged property therefore was security not only for the principal amounts of the mortgages but also for the interest stipulated to be paid. The whole amount of stipulated interest being thus chargeable on the mortgaged property, that property was security for any portion of such interest which remained unrealized out of the rents and profits. It is thus manifest that the mortgaged property was security for the amount of deficiency. It is deficiency in the stipulated amount of interest which was recoverable by the mortgagee, under the terms of the mortgage, in the event of the rents and profits being found to be insufficient to cover the whole amount of interest. It is true that the mortgagor undertook a personal liability also for the amount of deficiency, but this he did not only for the amount of deficiency but also for interest thereon at the rate of Rs. 2 per cent. per mensem. The fact of his undertaking a personal liability for the stipulated interest did not relieve the mortgaged property from liability to satisfy the deficiency. This amount of deficiency the mortgagees are in our opinion entitled to get for the whole period of the mortgage and not for six years only. This case cannot be distinguished in principle from that of *Muhammad Husain v. Sheodarshan Das* (1). In that case the mortgagor was entitled to a *malikana* allowance from the mortgagee. This allowance was not paid and it was held that the amount of the *malikana* allowance should be deducted from the mortgage money for the full period of the mortgage, although the mortgagor might have sued and recovered the arrears of *malikana* separately. The principle of this case clearly applies to the present case and the mortgagees are entitled to obtain the deficiency of interest for the

1910

CHINTAMAN

v.

DULARI.

(1) (1907) 4 A. L. J., 176.

1910
CHINTAMAN
v.
DULARI,

full period during which the mortgage money remained unsatisfied. The case of *Ganga Sahai v. Lochan Singh* (1) relied upon by the learned Judge is not in point. There it was held that additional interest was not payable as the mortgagee waived his right to it, but the mortgagor was declared to be liable for the interest originally agreed to be paid. As to the additional interest claimed in the present case at the rate of Rs. 2 per cent. per mensem on the amount of deficiency, it is not according to the terms of the mortgages a charge on the mortgaged property. Therefore the defendants, in our opinion, are not entitled to obtain further interest on the amount of deficiency in interest. It is stated by the defendants that the amount of deficiency in interest for 39 years during which the mortgage remained undischarged is Rs. 2,100-7-9. They have claimed further interest on that amount but in view of the opinion expressed above they are not entitled to it. As to Rs. 2,100-7-9 the accounts produced by them was found by the court of first instance to be in accordance with the patwari's account and the learned Judge accepted this finding and held the accounts to be correct. There can be no objection, therefore, to the correctness of the principal amount claimed as deficiency in interest. This amount we hold the defendants are entitled to get from the plaintiff in addition to the principal amounts of the two mortgages; that is to say, the plaintiff can obtain redemption upon payment of Rs. 4,100-7-9. The result is that we allow the appeal, vary the decree of the courts below and make a decree for redemption upon payment within six months from this date, of Rs. 2,000 for principal and Rs. 2,100-7-9 for deficiency of interest, in all Rs. 4,100-7-9, together with interest at the rate of 11 annas per cent. per mensem on Rs. 2,000, the principal amount secured by the mortgage, from the date of the suit, to the date fixed for payment and further interest on the amount decreed at the rate of 6 per cent. per annum from such date to the date of actual payment; as also, of the costs of the suit as hereinafter provided. The respective parties will pay costs in all courts in proportion to failure and success. The objections taken by the respondent under order 44,

(1) *Weekly Notes*, 1886, p. 50.

rule 22 of the Code of Civil Procedure, fail and are dismissed with costs.

Decree modified.

1910

CHINTAMAN
v.
DULARE.

1910.
July 28.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Know and Mr. Justice Banerji.

TULSHI RAM SAHU AND ANOTHER (PLAINTIFFS) v. GUR DAYAL SINGH AND ANOTHER (DEPENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 91—Redemption—Mortgage of fixed rate tenancy by tenant—Death of tenant without heirs—Right of zamindar to redeem—Escheat to Crown—Act (Local) No. II of 1901 (Agra Tenancy Act), sections 5, 18, 20, 57.

Held that on the death of a fixed-rate tenant without heirs his tenancy does not escheat to the Crown but reverts to the zamindar. Ram Dihal Rai v. The Maharaja of Vizianagram (1) overruled. Ranees Sonet Kowar v. Mirza Himmut Bahadoor (2) distinguished.

THE facts of this case were as follows :—

One Ram Dhian Koeri was a fixed rate tenant of the holding in dispute. In 1870 he usufructually mortgaged the holding to the respondents, Gurdial Singh and others. Ram Dhian disappeared and was not heard of for more than seven years. The zamindars of the village, thereupon, brought this suit for redemption on the ground that Ram Dhian having died heirless, the tenancy lapsed to them. Among other defences, it was pleaded that on the death of Ram Dhian, the tenancy went to the Crown and not to the zamindar, and the zamindar consequently had no interest to redeem the mortgage. This plea found favour with both the courts below and they dismissed the plaintiffs' suit. The plaintiffs appealed to the High Court. At the hearing of the appeal before the Single Bench the correctness of the ruling in *Ram Dihal Rai v. The Maharaja of Vizianagram* (1) was not discussed, the learned Judge having stated that he considered himself bound by that ruling. It was, however, contended that as there was no finding by the lower Appellate Court that the tenant was in fact dead, the ruling could not apply. This contention was met

* Appeal No. 132 of 1909 under section 10 of the Letters Patent.

(1) (1903) I. L. R., 30 All., 488. (2) (1876) L. R., 3 I. A., 92; I. L. R., 1 Calc., 391.